

1 sexual orientation. However, the State, and indeed this Court, are not sure how much  
2 of this social stigma is caused by the State and how much is caused by private parties.

3 Every court addressing this or related issues has noted that it is irrelevant  
4 to a court=s analysis to consider personal, moral, or religious beliefs about whether  
5 persons should enter into intimate same-sex relationships or whether same-sex  
6 individuals should be allowed to marry. See e.g., *Alaska Civ. Liberties Union*, at 783.  
7 Casual reference to any of the popular national or local media shows that this topic is  
8 highly charged. This Court recognizes that it is this Court=s duty to preserve the  
9 constitutional rights of all parties regardless of how unpopular they may be or unpopular  
10 may be their cause. Indeed, this Court finds itself quite sympathetic to the plight of  
11 Plaintiffs. See e.g. *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997).

## 12 DECISION AND ORDER

13 In spite of this Court=s sympathy for the plight of the Plaintiffs, this Court  
14 finds that, in light of the legal landscape mentioned above, the State=s motion to dismiss  
15 should be granted. In sum, Plaintiffs seek this Court=s order requiring the Montana  
16 legislature to enact a domestic partnership or civil union arrangement. In other words,  
17 Plaintiffs want this Court to direct the legislature to enact a set of statutes. This Court  
18 finds that to be an inappropriate exercise of this Court=s power. Primarily, it would  
19 violate the separation of powers contained in Article III, section 1, of the Montana  
20 Constitution, which provides: AThe power of the government of this state is divided  
21 into three distinct branches--legislative, executive, and judicial. No person or persons  
22 charged with the exercise of power properly belonging to one branch shall exercise any  
23 power properly belonging to either of the others . . . .@

24 Legislative Council  
25 December 7, 2011

1           This Court, in the past, has been willing to exercise its judicial power  
2 when it found a violation of the Montana Constitution as it related to a specific statute  
3 applying to gay people. See Gryczan. However, what Plaintiffs want here is not a  
4 declaration of the unconstitutionality of a specific statute or set of statutes, but rather a  
5 direction to the legislature to enact a statutory arrangement. This Court finds  
6 Plaintiffs= proposal, although appealing, to be unprecedented and uncharted in Montana  
7 law. Although Plaintiffs have, as noted above, specified a variety of statutes that they  
8 feel make up a Astatutory scheme,@ there has been no explicit listing of all of the statutes  
9 that would be affected by this Court=s ruling. In other words, Plaintiffs= desired  
10 remedy would certainly affect numerous of the statutes mentioned above. However,  
11 the desired remedy would also undoubtedly affect statutes that have not been  
12 specifically drawn to this Court=s attention. For this Court to direct the legislature to  
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14 enact a law that would impact an unknown number of statutes would launch this Court  
15 into a roiling maelstrom of policy issues without a constitutional compass.

16           Plaintiffs note that this very Court in *Columbia Falls Elem. Sch. Dist. No.*  
17 *6 v. State*, 2005 MT 69, 109 P.3d 257, 326 P.2d 304, declared a statutory scheme  
18 unconstitutional and allowed the legislature the broad discretion to correct the  
19 unconstitutional portions of the statutes. However, there is a great difference between  
20 *Columbia Falls* and this case. In *Columbia Falls*, this Court was dealing with a  
21 discreet school funding formula that all parties identified. When the Court acted, it  
22 knew exactly what statutes would be affected by legislative action. That is not the case  
23 here. Here, Plaintiffs refer to a Astatutory scheme.@ (Pls.= Reply Br. Supp. Mot.

1 Summ. J., at 4.) However, the statutes that have been brought to the Court=s attention  
2 in this case are not a scheme such as the Court was presented in *Columbia Falls*. Here  
3 we have a not yet entirely specified array of statutes that deal with many different topics  
4 and were enacted over a variety of years.

5 It is true that the Supreme Courts of Vermont and New Jersey have done  
6 what Plaintiffs would have this Court do. However, those states did not have a  
7 marriage amendment, as does the state of Montana. This Court should note that it does  
8 not particularly feel that the marriage amendment, standing alone, bars the relief the  
9 Plaintiffs seek. It is instructive to note that the Alaska Supreme Court dealt with a  
10 similar amendment in *Alaska Civ. Liberties Union*. However, the Alaska court was not  
11 directing the Alaska legislature to enact a statutory domestic partnership arrangement  
12 that would affect an unknown number of statutes. Rather, the Alaska Supreme Court  
13 was dealing with a specific statutory arrangement dealing with employee benefits.  
14 That court, as noted above, held that the Alaska marriage amendment did not bar its  
15 finding those provisions unconstitutional. In the view of this Court, the proper way to  
16 deal with Plaintiffs= concerns are specific suits directed at specific, identifiable statutes.

17 Although this Court does not necessarily feel that Montana=s marriage  
18 amendment bars it from acting, this Court does feel that the existence of the marriage  
19 amendment plays into the jurisprudential decision that Plaintiffs= requested relief  
20 constitutes an impermissible sojourn into the powers of the legislative branch.

21 Attached to the State=s brief in support of its motion to dismiss filed on  
22 October 29, 2010 was the voter information pamphlet presented when CI-96 was  
23 adopted by the people of Montana. Quotes from both proponents and opponents of the

1 constitutional amendment seem to suggest that the marriage amendment then under  
2 contemplation had more to do with the mere designation of people as being married.  
3 Indeed, the proponents and opponents seem to both acknowledge that the marriage  
4 amendment would have something to do with benefits and obligations that relate to the  
5 status of being married. For example, the proponents noted that Asmall business  
6 employers in Montana may someday be required to provide expanded health coverage,  
7 retirement and fringe benefits to same-sex >spouses= of employees.@ The opponents  
8 noted that Aif CI-96 were to pass, the State could nullify the contractual agreements  
9 made between same-gender partners. CI-96 would limit innovative and robust  
10 companies from treating their employees equitably.@ Thus, it appears that both the  
11 proponents and opponents of CI-96 felt that that constitutional provision bore on some  
12 of the very issues now presented to this Court.

13 In sum, this Court finds that it cannot grant the relief that Plaintiffs seek.  
14 To do so would violate the constitutional separation of powers existing in the state of  
15 ////  
16 ////  
17 Montana. Therefore, Defendant=s motion to dismiss is GRANTED, and Plaintiffs=  
18 motion for summary is DENIED.

DATED this \_\_\_\_ day of April 2011.

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21 \_\_\_\_\_  
JEFFREY M. SHERLOCK  
District Court Judge

22  
23 pcs: James H. Goetz/Benjamin J. Alke  
Elizabeth L. Griffing